

Just War Theory and the 2003 Decision to Invade Iraq

by

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Abstract

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In American history few foreign policy decisions have been as controversial as the Bush Administration's choice to invade Iraq in 2003. This decision had many supporters but it also had significant, forceful opposition from both domestic and international opponents. The intellectual under-pinning for the opposition largely came from the philosophical doctrine of Just War Theory and the international law it informed. Accepting that war itself is terribly destructive and should be avoided if possible, this theory holds that a nation's decision to go to war is nonetheless justified only if certain criteria are met. This paper briefly discusses the historical origins of Just War Theory, concisely reviews the tenets of Just War Theory as they stand today, and examines if the Bush Administration adhered to the Jus Ad Bellum tenets of Just War Theory prior to its decision to invade Iraq.

Just War Theory and the 2003 Decision to Invade Iraq

I stand before you as someone who is not opposed to war in all circumstances. The Civil War was one of the bloodiest in history, and yet it was only through the crucible of the sword, the sacrifice of multitudes, that we could begin to perfect this union, and drive the scourge of slavery from our soil.....What I am opposed to is a dumb war. What I am opposed to is a rash war. A war based not on reason but on passion, not on principle but on politics.

—Barack Obama, 2002

In American history few foreign policy decisions have been as controversial as the Bush Administration's choice to invade Iraq in 2003. This decision had many supporters but it also had significant, forceful resistance from both domestic and international opponents. As the war progressed, this resistance intensified as the purpose for the war and how it was conducted came under increasingly vocal criticism. The intellectual under-pinning for the opposition largely came from the philosophical doctrine of Just War Theory and the international law it informed. Accepting that war itself is terribly destructive and should be avoided if possible, this theory holds that a nation's decision to go to war is nonetheless justified only if certain criteria are met. This paper briefly discusses the historical origins of Just War Theory, concisely reviews the tenets of Just War Theory as they stand today, and examines if the Bush Administration adhered to the Jus Ad Bellum tenets of Just War Theory prior to its decision to invade Iraq.

Origins of Just War Theory

Just War Theory has developed over two thousand years with roots primarily in Roman and Greek thought.¹ Various Greek thinkers had emerging ideas on war and its conduct. In his *History of the Peloponnesian War*, Thucydides addressed why a nation should go to war and in the *Republic* Plato addresses how wars should be conducted.²

Aristotle's ideas on ethics – of various human activities being considered “right” or “wrong” – ultimately laid the ground work for much of the Western philosophic tradition – to include Just War Theory.³ Later, as Greece declined and Rome emerged, Roman leaders and thinkers had to grapple with the ideas of war, peace, justice, and the state. The most prominent of these was the statesman Cicero. Cicero took the strongest early step toward what we know as Just War Theory by arguing that war should be waged only for “legitimate” reasons in support of the empire and that the conduct of a war should, if possible, be moderated to lessen the amount of violence required.⁴

It was upon these early philosophers' nascent thoughts that Saint Augustine in the fourth century AD further developed what came to be known as Just War Theory. Augustine “was the first great formulator of the theory that war must be just, which thereafter has mainly directed the course of Western Christian thinking about the problem of war.”⁵ Like the Greeks and the Romans, Augustine was not operating in a vacuum when he wrote. In his time the Roman Empire was coming to an end and he was concerned about the potential repercussions to the Catholic Church. Despite the conversions of many leading citizens, including the Emperor, many Romans believed that Catholic teachings were inherently pacific (which disallowed adherents from their proper role as participants in the militaristic defense of the empire).⁶ Augustine's writings then, which are less a coherent set of rules or guidelines for the conduct of war than a collection of letters and essays written over time, reflect that he felt “that he needed to establish once and for all that Christians could in conscience assume the full obligations of citizenship, including participation in warfare.”⁷

Augustine's writings focused exclusively on "Jus ad bellum" or "the right to (go to) war"; he does not address "Jus in bello" or the conduct of belligerents once engaged in war. First, Augustine believed that the horrors of war could only be justified if the decision to initiate war was based on "good intentions." Clearly, what intentions are "good" is debatable but Augustine wrote "As a rule, just wars are defined as those which avenge injuries, if some nation or state against whom one is waging war has neglected to punish a wrong committed by its citizens, or to return something that was wrongfully taken."⁸

Augustine's second significant contribution to Just War theory was his insistence that the decision to go to war rest solely with the proper authority – the state's sovereign: "the natural orderordains that the monarch should have the power of undertaking war if he thinks it advisable."⁹ Augustine's thoughts on the justness of war "good intentions" and "proper authority" remained the most important tenets of Just War Theory until St Thomas Aquinas work almost 1000 years later.

St Thomas Aquinas, who lived in the thirteenth century, is for many Catholics the church's preeminent theologian and philosopher. Like Augustine before him, he believed that war was one of humankind's greatest evils and that ideally Christians should be pacifists but in practice they must be prepared to fight against a greater evil. Specifically, he believed that Christians could support and fight in war if the war was "just."¹⁰ His concept of justness in war, from which he expanded on from Augustine's ideas, included three tenets. First, he reinforces Augustine's ideas of "proper authority," stating "since the care of the State is confided to Princes, it is to them that it belongs to defend the city, which is subject to their authority."¹¹ Second, Aquinas stated the

reason for war must be just, meaning “those attacked must have, by a fault, deserved to be attacked.” Finally, again echoing Augustine he believed that the proper authority must have good intentions, meaning that their efforts will cause “a good to be effected or an evil to be avoided.”¹²

Just War Theory continued to evolve as Europe left the Middle Ages and moved through the Renaissance and into the enlightenment. Important developments for Just War Theory included, first, the decrease in the role of God in the theory.¹³ The enlightenment challenged the accepted role of faith and religion in almost all aspects on European society – government, science and art. Now, no longer was a war considered “just” because a sovereign ruler, who supposedly was endorsed as a ruler by God, authorized it. Instead many realist writers argued that instead of God ordaining a ruler’s actions, war was just simply because “the sovereign must do whatever is necessary to satisfy their interests.”¹⁴

The second, significant evolution during this time involved the concepts of “Jus in bello” emerged as equally important in the theory as those supporting “Jus ad bellum.” Writers like Alberico Gentili, Hugo Grotius and Emerich de Vattel wrote about the idea of “proportionality” in war and “how to adapt and advance effective standards for the conduct of war within a radically changing social milieu.”¹⁵ Their concerns were not about the moral or ethical case to *declare* war but the conduct of nations and their soldiers while committed to one. Their efforts were significant and provided much of the intellectual depth to the emergent international effort during the 19th century to develop so called “laws of war.”

The international effort to develop “laws of war” during the 1800’s was not the first time nations acknowledged Just War Theory elements as a legitimate norm in the international system. For example, the Treaty of Ryswick between France and England in 1697 stated that each would refrain from “plundering, depredation, harm-doing, injuries and infestation whatsoever.”¹⁶ However, in the nineteenth and twentieth century, for the first time large portions of the international community came together at various instances in an attempt to establish international standards to govern an individual nation’s decision to go to war and their conduct as they executed it. Treaties like the St. Petersburg Declaration of 1868 which was “the first formal agreement prohibiting the use of certain weapons in war” and the “Project of an International Declaration concerning the Laws and Customs of War” became more normal parts of international discourse between states.¹⁷ In the early 20th century, the Geneva and Hague Conventions and then later the efforts by the United Nations enlarged the international efforts to codify states proper behavior regarding “Jus in bello” and “Jus ad bellum.”

Just War Theory Principles Today

Just War Theory used today and reflected in international law is largely based on the philosophical and legal evolution of Jus ad Bellum and Jus ad Bello as briefly described above. However, due largely to American efforts in both Iraq and Afghanistan a third branch of Just War Theory, “Jus Post Bellum” – Justice After War - has received more recent attention from noted scholars, such as Brian Orend. They argue that Jus Post Bellum “has traditionally been neglected in the conceptualization of the laws of war in the 19th and 20th century, which remains based on the classical division into jus ad bellum and jus in bello.”¹⁸ These proponents argue that Jus Post Bellum is critical in Just War theory in that it addresses what a nation should do to wage a Just War at the

point when both a conflict is nearing its termination and when it has moved into a post-conflict environment.

While variations exist for the fundamental principles of each of these three branches of Just War Theory, Table 1 below reflects the general consensus for each.

Table 1:

<i>Jus ad bellum</i> 1. Just cause 2. Right intention 3. Proper authority and public declaration 4. Last Resort 5. Probability of Success 6. Proportionality	<i>Jus in bello</i> 1. Obey all international laws on weapons prohibition 2. Discrimination and Non-Combatant Immunity 3. Proportionality 4. Benevolent quarantine for POWs 5. No Means <i>Mala in Se</i> 6. No reprisals	<i>Jus post bellum</i> 1. Proportionality and Publicity 2. Rights Vindication 3. Discrimination 4. Punishment #1 (For Leaders) 5. Punishment #2 (For Soldiers) 6. Compensation 7. Rehabilitation
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Jus Ad Bellum and the Decision to go to War in Iraq 2003:

Modern Jus Ad Bellum Theory centers around the “Just Cause” principle. An examination of this principle reveals, in part, why the decision to go to war in 2003 was so controversial. There are various contemporary descriptions about what a Just Cause is but “most modern just war theorists, speak of the one just cause for resorting to war being the resistance of aggression.¹⁹ This is a start but not entirely helpful. Michael Walzer argues that “there is a strange poverty in the language of international law” regarding what is aggression, and that “this refusal of differentiation makes it difficult to mark off the relative seriousness of aggressive acts.”²⁰ A more encompassing description of a just cause includes actions such as “self-defense from external attack; the defense of others from such; the protection of innocents from brutal, aggressive regimes; and punishment for a grievous wrongdoing which remains uncorrected.”

Cognizant of Just War Theory and the Just Cause principle, the Bush Administration along with the majority of the US Congress (apparently) accepted this broader definition. The October 2002 “Joint Resolution to Authorize the Use of United States Armed Forces against Iraq” attempted to show that “the current Iraqi regime has demonstrated its continuing hostility toward, and willingness to attack, the United States.”²¹ In support of this statement Congress specifically listed Iraqi transgressions in the resolution. The list included –

- The repression of Iraqi citizens
- Harboring of Al Qaeda elements and support for other terrorist organizations
- Repeated violations of the 1991 Gulf War Cease Fire Agreement specifically in regards to United Nations Security resolutions concerning Weapons of Mass Destruction
- The attempt on President Bush’s life in 1993
- Repeated attempts to shoot down coalition aircraft enforcing UN mandated no fly zones.

Congress concluded that these acts demonstrated Iraqi aggression and the failure of Iraq to accept international norms. As such, Congress authorized the president to –

use the Armed Forces of the United States as he determines to be necessary and appropriate in order to-- (1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.²²

Opponents of the President’s decision, understanding the administration and Congresses attempts to at least align their reasoning with Just War principles, rejected the Just Cause arguments of the resolution believing the elements were not compelling.

Critics like author Andrew Fiala argued the Bush Administration was insincere and that “Iraq shows us how easy it is to manipulate just war concepts to suit a political agenda.”²³ While nearly all opponents of the decision were quick to point out that Saddam Hussein’s Baathist regime was at the least problematic - anti-war Senator Russ Feingold stated, “Saddam Hussein is exceptionally dangerous and brutal, if not uniquely so” - they did not see his removal as a valid policy option due in part because of the lack of a compelling Just Cause argument.²⁴ These critics felt that the Administration failed to meet fundamental aspects of the Just Cause principle and did not support the Congressional Joint Resolution or the administration.

In his book “*Selling a Just War*,” Michael Butler operationalizes the principle by defining seven criteria that would establish a legitimate case for a war based on Just Cause (table 2 below).

Table 2 ²⁵

Self Defense - The vital security and national defense of the attacked is at stake in the crisis
Direct Violent Crisis Trigger - An act of direct and extreme violence precipitated a foreign policy crisis for the attacked
Significant power discrepancy between trigger and target - The actor triggering a foreign policy crisis is significantly more powerful than the other party
Territory seized - Territory belonging to one a party was targeted or seized by another actor
Property/persons seized - Property and /or persons belonging to a party were appropriated
Authoritarian/military regime - Non-democratic regime responsible for the attack / crisis
Response to punishment of evil - Evil acts flouting basic ethical and moral conventions have been perpetuated against a party

Butler’s criteria highlight the problem many opponents had with the Joint Resolution, believing that it simply did not meet a Just Cause standard required to commit the nation to war. USMC LTG (R) Greg Newbold spoke for many when he declared “I don’t accept the stated rationale for invading Iraq” because it was “an unnecessary war” which “made no sense.”²⁶ Understanding that the Baathist regime was

authoritarian and had perpetrated “evil” acts, thus arguably meeting two just Cause criteria, was not enough to obligate the nation to war. Committing American lives, money and prestige – as well as the lives of enemy combatants and civilians – was not appropriate based on Butler’s remaining criteria since –

- The vital national security of the US were not at stake
- No American property or lives had been attacked or seized
- There was not an imminent threat of such an attack
- Iraq was a foe that was so clearly inferior militarily to the US capabilities

Career Foreign Service Officer John Brown’s actions are an example of the opposition who believed the war was not justifiable under the Just Cause principle or in accordance with their personal view on how American power should be utilized. Brown, who resigned in protest on the eve of the war in March 2003, stated, “the United States is becoming associated with the unjustified use of force,” because “The president has failed to explain clearly why our brave men and women in uniform should be ready to sacrifice their lives in a war on Iraq at this time.”²⁷

Other critics like scholar Richard Falk simply argued that the Joint Resolution reasoning was inconsistent in that it applied a Just Cause standard to Iraq that it did not apply to other countries. Falk, writing in the American Journal of International Law, concluded that “the security and related anti-Qaeda arguments were unconvincing, and the claimed humanitarian benefits resulting from the war were emphasized by American officials as a way to circumvent the illegality of the American-led recourse to force.”²⁸

For example –

- Other nations, like Iran, supports terrorism much more so than Iraq.

- North Korea already has weapons of mass destruction, has test fired missiles potentially capable of carrying them and frequently issues bellicose statements against the US and its allies.
- Numerous countries such as Saudi Arabia, China and others have internal human rights issues related to the oppression of their citizenry.
- Many countries, to include the US ally Israel, have ignored UN resolutions in the past.

If the decision in Iraq was in accordance with the charges laid out in the Joint Resolution, why was the use of force against these countries not considered? Ultimately the critics were not swayed by pro-war arguments that Iraq was a unique case in that it met not just one or two of the criteria, but multiple ones.

Washington Post columnist David Ignatius wrote, that it was a “war of choice, not necessity, and one driven by ideas, not merely interests,” and thus the war violated Just Cause principles.²⁹ The “ideas” which influenced the decision included Neo-Conservative foreign policy goals advocated by administration leaders like Assistant Secretary of Defense Paul Wolfowitz and Under Secretary of Defense for Policy Daniel Fieth. These ideas influenced policies that became known as the “Bush Doctrine.” In part, this doctrine asserted that removing Saddam from power would begin the fundamental transformation of the Middle East; Installing a democratic, pro-western government would finally “drain the swamp” of terrorists and rogue regimes.

Some, like investigative journalists Greg Muttitt and Ali Issa argued that the war was about none of these things and was simply about the safeguarding of Iraqi oil.³⁰ Other critics such as US Representative Dennis Kucinich went farther. He believed the

war was to not merely a safe guarding of American access to Middle Eastern oil but for direct control of Iraq's resources. He saw the "choice" for war as based solely on greed arguing that, with 300 billion barrels, valued at \$21 trillion, "Oil was the primary reason for the invasion of Iraq."³¹ He believed that the decision was simply another example of the "American Empire's" grab for more of the world's wealth and power.

Jus Ad Bellum opposition to the Iraq War went beyond disagreements over the administration's Just Cause arguments. Congressional opponents of the war like Senators Feingold and Kennedy argued that the administration failed to properly adhere to the tenets of "Last Resort" and "Proper authority and public declaration." Concerning Last Resort, referring to the Joint Resolution, critics acknowledged that it authorized force but only after the president determined that continued diplomacy "will not adequately protect the national security of the US against the continuing threat posed by Iraq or is not likely to lead to enforcement of all relevant UN Security Council resolutions regarding Iraq."³² Bush supporters argue that the events which occurred between October 2002 – March 2003 demonstrate the earnest efforts of the administration by its repeated attempts through the UN and other venues to get Saddam's Regime to comply fully with the dictates of the UN. It was only after these attempts were rebuffed that Bush notified Congress with a formal letter that "reliance by the United States on further diplomatic and other peaceful means" would not achieve the national objectives as stated by Congress in their Joint Resolution.³³

The tenant of last resort is based on the idea of "the moral primacy of peace over war" and that it should be undertaken only if no other option is available.³⁴ Critics like Senator John Kerry argue that the Administration failed this test. The war started

because the US chose to go to war, not because literally no other courses of action remained. They did. Kerry stated the US could have “given diplomacy a greater opportunity” and that a continued push for inspections was a viable policy option.³⁵ Others argued that the Administration could extend the decision out by allowing the coalition military commanders more time to assemble adequate ground forces (with the 4th Infantry Division late in arriving as a strong example) and apply continued, increasing pressure on the regime. Clearly, other options – perhaps sub-optimal ones – rather than war remained. However, these bad options were still better than war. Instead of pursuing them the administration failed to push negotiations and diplomacy because it had pre-determined that ousting Saddam in a pre-emptive war was the best course the nation should take. Anti-war supporters rejected this approach. Senator Kennedy in a September 2002 speech summed up the opposition’s reaction to this position stating “the Administration has not made a convincing case that we face such an imminent threat to our national security that a unilateral, pre-emptive American strike and an immediate war are necessary.”³⁶

A third Jus Ad Bellum argument against the decision for war was based on the “Proper authority and public declaration” principle. Despite the October 2002 Joint Resolution some critics argued that domestic law, the Constitution, did not allow for the president to use military force without the further consent of Congress. After it was clear that the US was facing a pro-longed, difficult insurgency in Iraq some politicians who had voted for the Joint Resolution began to argue that it in fact was never intended to authorize the President to use force the way he did. Instead it was meant as a means to give weight to our on-going diplomatic efforts. Running for President in 2004, Senator

Kerry stated, “In the resolution that we passed, we did not empower the president to do regime change.”³⁷ This was a largely fatuous argument in that the most serious practitioners and observers fully understood that voting for the resolution enabled the president to use force “as he determines to be necessary and appropriate” and this could certainly include the removal of Saddam’s government.³⁸ In addition, the president pointed to the Iraq Liberation Act of 1998, which “Declares that it should be the policy of the United States to seek to remove the Saddam Hussein regime from power in Iraq and to replace it with a democratic government.”³⁹

More serious “proper authority” opposition came from those who based their argument on international law and the role of the UN. These opponents base their argument on the UN Charter, specifically Article 39 which states,

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.⁴⁰

Article 41 authorizes the council to take economic and diplomatic actions to achieve their ends while article 42 authorizes “action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”⁴¹

The Bush Administration cited two points in support of the administration’s proper authority. First, they state they fully supported the UN Charter and its outline for international security arrangements. Further, any existing tension that existed over the Bush Administrations push to enforce UN sanctions was not because the Administration wanted to ignore the UN. Instead the tension existed because Iraq, and even some member states, wanted to ignore the UN. As President Bush stated to the General Assembly in September 2002,

Will the United Nations serve the purpose of its founding or will it be irrelevant?We want the United Nations to be effective and respectful and successful. We want the resolutions of the world's most important multilateral body to be enforced. And right now those resolutions are being unilaterally subverted by the Iraqi regime.⁴²

The second half of their argument concerned the legitimacy of their decision is that they received proper authority from the UN and acted in accordance with existing UN sanctions and thus did not violate its charter or international law. First they point to the number of UN Resolutions that the UN itself stated Iraq had failed to satisfy (Table 3, below).

Table 3⁴³

Resolution 688	→	Human Rights violations of Iraqi citizens
Resolution 686/-687	→	Failure to account for over 600 Kuwaiti, Saudi, Indian, Syrian, Lebanese, Iranian, Egyptian, Bahraini, Armenian and American citizens from the Gulf War
Resolution 1373	→	Failure to disavow all support to terrorist organizations
Resolution 699	→	Failure to allow full weapons inspections in Iraq
Resolution 707	→	Failure to provide "full, final and complete disclosure" of all aspects of its WMD programs
Resolution 715	→	Failure to comply with long-term IAEA inspections
Resolution 1051	→	Failure to comply with IAEA's "dual-use" regime
Resolution 1060	→	Failure to allow unrestricted access to UN Weapons inspectors

Second, they state that Resolution 1441, passed in November 2002, offered Iraq "a final opportunity to comply with its disarmament obligations" as outlined in the above resolutions.⁴⁴ UN lead inspector Hans Blix stated in his final report to the UN on 7 March 2003, Iraq's recent efforts, "cannot be said to constitute immediate cooperation. Nor do they necessarily cover all areas of relevance."⁴⁵ A failure of the UN at this point to pass another resolution specifically authorizing force by member nations against Iraq had more to do with international politics than with a sincere desire to adhere to international law. Third, they return to the UN Charter for their final point. Former Justice Department

John Yoo argues that “The UN Charter system classifies all uses of force into three categories: legal use of force authorized by the Security Council; legal use of force in self-defense; and illegal use of force, which includes everything else.”⁴⁶ Since the UN failed to approve an explicit use of force resolution, the US was still within the bounds of international law since it, Yoo argues, used force in self-defense. He cites Article 51 of the UN Charter which states, “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”⁴⁷ All of the previous UN resolutions and US laws demonstrated that the US clearly believed that they were threatened by Iraq and that the use of force to ensure their security was justified.

A final argument the administration used was that despite what the UN did or did not do, the US was free to act as it saw fit in regards to its national security. As a sovereign nation the US did not have to pass a “global test” for the use of force in defense of its perceived interests. Cognizant of the importance of world opinion, international law and the moral weight that some place with the UN, the administration stated that ultimately “decisions to defend America should remain in the Oval Office.”⁴⁸ President Clinton’s decision just a few years earlier to use force in Kosovo absent of an authorizing UN resolution was pointed to as precedent for the use of force lacking an international mandate. Specifically, this reasoning held that the authorities in the Constitution – the Commander in Chief role of the presidency combined with the Congress’s “declaration” in the Joint Resolution - was all the legitimacy the decision needed. This domestic authority trumped any concerns from the international

community and allowed the administration to pursue America's self interests and defense as it saw fit.

Of course critics disagreed with the Bush administration. First, they rejected the idea that the Bush Administration was interested in supporting the United Nations and ensuring its relevance arguing that a concerted effort was underway "to discredit the world body in the eyes of public opinion."⁴⁹ Precedent for this behavior, they believed, could be found in previous Administration's decisions like the one to withdraw its support from the International Criminal Court earlier in 2002.⁵⁰ This decision, others like it, and its efforts in regard to Iraq in the UN were meant to harm the reputation of these international bodies to the degree that they lost relevance and thus allow the US to act free of any meaningful restraint.

Second, they did not agree that the language of the oft cited resolutions offered the US and its coalition members a valid reason for the use of force. Concerning the initial UN Resolution 678 which authorized for the first Gulf War, the UCLA Journal of International Law and Foreign Affairs stated "The initial Security Council resolution authorizing force terminated once its stated objectives had been achieved and a subsequent permanent ceasefire resolution affirmed the termination of that authority."⁵¹ The remaining resolutions, while Iraq failed to abide by them in letter and spirit, simply did not contain language which explicitly authorized member UN states to utilize force to enforce them. Critics point to comments on the day of the vote for resolution 1441 when British Ambassador to the UN Sir Jeremy Greenstock stated, "There is no "automaticity" in this Resolution. If there is a further Iraqi breach of its disarmament obligations, the matter will return to the Council for discussion as required."⁵²

Finally, critics disagree with the Administration's claim that the US Constitution alone provides the requisite authority to authorize the use of force. As a signatory to the UN Charter the US acknowledges and pledges to abide by the structures of the security arrangements within. However, their decision to use force falls outside of this paradigm. The US decision was clearly not authorized by the UN under Article 39 and the administration's claims that they acted under the self-defense precepts articulated by John Yoo are not valid. Instead, they argued this was a unilateral, pre-emptive, war of choice outside the established legal system created by the international system.

The Bush Administration's Decision to Invade Iraq was in Accordance with Jus Ad Bellum Principles

Few conflicts have had such a prolonged, domestic and international debate about its "justness" prior to it actually beginning than the Iraq War. Inconclusive as the debate was and contentious as the decision to invade Iraq remains, the Bush Administration indeed complied with the spirit of Jus Ad Bellum. The Bush Administration satisfied the Jus Ad Bellum tenets of Just War Theory by publically –

- (1) Concurring with the Iraq Liberation Act, passed by a Republican House and a Democratic Senate and signed by a Democratic President, which -
 - (a) Stated regime change is the legislated goal of the US due to a long list of hostile and aggressive Iraqi acts.
 - (b) Called for an international tribunal to try Saddam Hussein for "crimes against humanity, genocide, and other criminal violations of international law."⁵³

(2) As a member nation, repeatedly seeking to work through the UN to address what it and the UN viewed as serious Iraqi threats to regional stability and the “failure to implement the relevant Council resolutions.”⁵⁴

(3) Announcing US intentions to act in accordance with the Congressional Joint Resolution, passed with strong majorities from both houses, to “defend the national security of the US against the continuing threat posed by Iraq; and enforce all relevant UN Security Council resolutions regarding Iraq.”⁵⁵

Despite the administration’s domestic and international deliberations, the legality of the decision and the administration’s adherence to Jus Ad bellum principles remain in dispute for five reasons. First, the length of time, from 1990 – 2003, in which Iraq’s transgressions occurred. Next is the ambiguity of the UN Charter itself. Third, was the politicized nature of the international system. Fourth was the inconclusive insurgency that followed the initial victorious first phase of the war, and finally the failure to find WMD.

First, the issue of Iraq played out over a lengthy amount of time. One of Michael Butler’s criteria for a just war is a “Direct Violent Crisis Trigger,” meaning that a nation is justified to respond if an aggressor conducts a clear, violent act against them. This criterion was met both when the Iraqi government attempted to assassinate President George H.W. Bush in 1993 and in the Iraqi’s repeated attempts to shoot down US and allied aircraft enforcing the UN sanctioned no fly zones during the 1990s and early 2000s. The complicating factor is that the US did not take decisive action to remove Saddam during this period. By failing to act, Iraqi aggression and intransigence became the norm. However, after 9/11 the US tolerance for Iraq’s behavior decreased

precipitously. The US decision in March 2003 was based on almost 15 years of Iraqi hostility but lacked the dramatic, timely act of aggression by Iraq that would have clarified the US decision for many. This lack of a final Iraqi act allowed critics to argue that the US had violated the “Last Resort” principle. This argument is debatable but not valid. The US had worked through the UN for years in an effort to compel Iraqi compliance with requisite UN resolutions. After the traumatic events of 9/11 the US engaged in an open effort to get final compliance. However, US efforts were rebuffed by Iraq and by some (China, Russia) at the UN. This, coupled with the fact that international will, such as it was, to continue to enforce non-violent sanctions against Iraq (sanctions) was deteriorating and getting harder to enforce, left the US with very limited options to deal with what it perceived as a very serious threat to American security.

Second is the ambiguity of the UN Charter itself concerning some key terms and declarations. If the UN Charter was more explicit with its definitions and language in Chapter VII the debate on the US decision would have been very different. Nowhere in the Chapter, to include the all important articles 39, 41, 42 or 51 are terms like “aggression,” “threat to the peace,” “restore international peace and security,” or “self-defense,” defined. Timothy Kearley writing in the Wyoming Law Review concluded, “The record shows that in the case of the Charter’s use of force rules, the drafters expressly refrained from defining aggression and implicitly avoided defining the limits of individual self-defense because they knew they could not agree upon such definitions.”⁵⁶ Arriving at a consensus in this type of process is difficult even for “simple” issues. Reaching agreement on issues concerning a state’s legal role for security within an international

system would and did result in very broad statements. The outcome for the Iraq War is that the inconclusive nature of the text allowed informed and earnest opponents and proponents of the decision to use the document to argue that their view was the correct one resulting in no real, legal consensus.

This hesitancy on the part of UN delegates and the resulting ambiguity, while understandable is thus ultimately unhelpful when difficult disputes arise. An examination of the intent of the delegates yields equally contradictory and confusing views. What did achieve consensus, however, was the idea that a framework which attempted to address all conceivable scenarios would not work. Kearly writes that participants,

finally agreed that even the most simple and obvious cases of aggression might fall outside any of the formulae suggested, and, conversely, that a nation which according to a formula strictly interpreted could be deemed the offender in any particular instance might actually - when all circumstances were considered - be found to be the victim of intolerable provocation. The problem was especially complicated by the progress of modern warfare and the development of novel methods of propaganda and provocation.⁵⁷

The third factor which complicated the discussion of the justness of the decision was the politicized nature of the international political system. There were many people for and against the war with honest, serious views based on Jus Ad Bellum principles. There were also those on both sides who manipulated these principles to further their domestic or international political agendas. This is not unique to the Iraq war and is the norm in all things political. This unpleasant truth while common does confuse an otherwise serious and important debate. Demonstrating this hypocrisy domestically, there seemed to be exponentially less criticism of the Clinton Administration when it ordered the Desert Fox bombing against Iraq in 1998 or the Kosovo campaign in 1999. Both efforts were executed without UN approval, had no formal Congressional

“Declaration of War,” resulted in the death of civilians, and were arguably far from a “last resort”. Internationally, some of the US’s European partners who expressed deep concern over the US violating the sanctity of the UN in fact participated in Desert Fox and the Kosovo campaign.

Fourth, while the initial 2003 victory in Iraq was a stunning feat of arms, what followed in the next eight and a half years was tragic and frustrating. If it is possible to imagine an alternate history – one in which an insurgency did not occur or was short lived – than even the question of the “justness” of the decision to go to war in Iraq would have faded much quicker than it has. Instead, the resulting calamity of the Iraq War has caused the justness of the decision to become wrapped up into the “smartness” of the decision and of the execution of the follow-on war and reconstruction effort. The justness of the war decision should not be confused with the logical reasoning to go to war in the first place or with the many missteps that followed once the US invaded.

Finally, the intelligence failure concerning WMD caused much damage to the administration’s position that their decision for war was a just one. Much like the reasoning above, if the US had found WMDs in Iraq, the continued debate over the decision for war would be much different. This colossal intelligence failure undermines a central Jus Ad Bellum tenant of the US decision to go to war. In a post 9/11 world, viewing an Iraq with a WMD capability as a serious, grave threat to the US and its interests is a reasonable and prudent position. Viewing a WMD-less Iraq as a serious, grave threat to the US and its interests is a much more tenuous, if not unsupportable position. When it was determined that Iraq did not have WMDs the entire decision to go

to war was discredited despite that the Bush administration and coalition partners believed that Iraq indeed possessed them.

Conclusion

The Bush Administration's 2003 decision to go to war with Iraq is in accordance with the traditions of Jus Ad Bellum tenets of Just War Theory. This controversial decision was complicated due to the elongated saga of the American and international community's relationship with Saddam's regime, the ambiguity laid out in the UN Charter, the inherent hypocrisy present in the international system, and the tragic results of the war itself – a bloody insurgency and a failure to find WMD. The discord of the decision to go to war in 2003 reflected a continuing, real tension in America. How much did the US value security and what were Americans prepared to give up domestically and in international standing to achieve it? It is not a new debate. During the Cuban Missile Crisis Robert Kennedy argued that the US should not conduct a pre-emptive air and sea attack against Cuba because “we are not that type of country.”⁵⁸ This idea, what type of country we are and who we aspired to be, was a central part of the debate about the Iraq War.

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